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IN THE

Supreme Court of the United States

October Term, 1973

No. 73 557

BILLY JENKINS,

Appellant,

v.

STATE OF GEORGIA,

Appellee.

MOTION OF ASSOCIATION OF AMERICAN PUBLISHERS, INC., MAGAZINE PUBLISHERS ASSOCIATION, INC., PERIODICAL AND BOOK ASSOCIATION OF AMERICA, INC., INTERNATIONAL PERIODICAL DISTRIBUTORS ASSOCIATION, INC., COUNCIL FOR PERIODICAL DISTRIBUTORS ASSOCIATIONS, AMERICAN BOOKSELLERS ASSOCIATION, INC. and NATIONAL ASSOCIATION OF COLLEGE STORES, INC. TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF APPELLANT'S JURISDICTIONAL STATEMENT AND BRIEF *AMICI CURIAE*

EDWARD C. WALLACE and
WEIL, GOTSHAL & MANGES
Attorneys for Amici
767 Fifth Avenue
New York, New York 10022

HEATHER GRANT FLORENCE
Of Counsel

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Statement

The Association of American Publishers, Inc., the Magazine Publishers Association, Inc., the Periodical and Book Association of America, Inc., the International Periodical Distributors Association, Inc., the Council for Periodical Distributors Associations, the American Booksellers Asso-

ciation, Inc. and the National Association of College Stores, Inc. (collectively referred to herein as "*Amici*") hereby seek leave to file a brief as *amici curiae*, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, in support of the Jurisdictional Statement filed by appellant herein.

On September 24, 1973 counsel for *Amici* wrote to counsel for appellant and to counsel for appellee requesting consent for *Amici* to file a brief as *amici curiae* in this proceeding. Counsel for appellant gave such consent by letter dated September 27, 1973, filed with the court and counsel for appellee has not yet responded to the request.

The *Amici*

The Association of American Publishers, Inc. is a not-for-profit trade association composed of more than 260 publishers, including many university presses and religious book publishers. They publish, in the aggregate, the vast majority of all general, educational, and religious books and materials sold in the United States through thousands of book, department, and drug stores, as well as newsstands and other outlets.

The Magazine Publishers Association, Inc. is a national trade association, founded in 1919, whose membership is composed of more than 134 publishers representing more than 451 magazines and other periodical publications with a combined readership of more than 89% of the adults in the United States.

The Periodical and Book Association of America, Inc. is a not-for-profit association for magazine and paperback

book publishers, who share a common interest in the sale of their products through independent wholesaler distribution channels throughout the United States.

The International Periodical Distributors Association, Inc. is a trade association of twelve national periodical distributors who each distribute, or arrange for distribution, of paperback books and periodicals throughout the United States, for ultimate distribution to retailers and the public.

The Council for Periodical Distributors Associations is a not-for-profit corporation founded 18 years ago that is the national association of 500 local independent wholesale distributors of magazines, comics, paperback books and newspapers in the United States and Canada.

The American Booksellers Association, Inc. is a national trade association representing 3,968 booksellers, including all the major ones. The members consist of chain operations, private bookstores, department store book departments and university book stores.

The National Association of College Stores, Inc. is a trade association composed of 2,250 stores serving more than seven million college students and faculty. Universities or colleges own 1,700 of these stores.

Interest of the *Amici*

This appeal is from the affirmance by the Supreme Court of the State of Georgia of the conviction of Billy Jenkins for exhibiting the motion picture "Carnal Knowledge" in a movie theatre in the city of Albany, Georgia.

None of the *Amici* at anytime has had any involvement with the creation, production, distribution or exhibition of this film; indeed, none is in any way involved in the motion picture industry. Accordingly, *Amici* will not discuss in detail the particular film or issues directly relating to this particular prosecution or Georgia law. Rather, as book and magazine publishers, distributors, wholesalers and retailers *Amici* are particularly sensitive to the detrimental effect of this conviction and the opinion below on the First Amendment rights of all citizens and their implications for the major legislative activity likely to result from *Miller* v. *California*, —— U.S. ——, 93 S.Ct. 2607 (1973). As associations representing businesses engaged in publishing and disseminating books and periodicals, *Amici* join in this motion and brief to urge the Court not only to accept this appeal and reverse the conviction, but to assist the *Amici* and others by providing clear guidelines for the interpretation and application of the constitutionally required tests and standards for dealing with non-protected materials issued by this Court in *Miller* v. *California, supra,* and its companion cases on June 21, 1973.

The concern of the *Amici* about the effect of this Court's opinion in *Miller* and its companion cases on the business activities of the members of the *Amici* and on the rights of free expression for all, led many of the associations herein represented to file a motion and brief as *amici curiae* in support of the Petition for Rehearing in *Kaplan* v. *California*, —— U.S. ——, 93 S.Ct. 2680 (1973). In that brief, *Amici* expressed concern that "[t]he decisions rendered in *Miller* and its companion cases have engendered tremendous confusion among educators, authors, publishers, dis-

tributors and law enforcement officials as to the meaning and proper implementation of this Court's three-pronged test."

In view of subsequent law enforcement and legislative activity as well as judicial decisions—particularly the decision of the Supreme Court of Georgia in this case—*Amici's* concern unfortunately has been proven well founded. Indeed, developments since *Miller* compel us to add to that list some members of the judiciary who, in the short time since *Miller*, have interpreted and applied the new tests and standards in such a variety of ways that the courts appear to be as deeply confused as to the meaning of this Court's guidelines as anyone else.[1]

The immediate practical necessity for more specific guidelines and clearer standards to dispel the layers of confusion and uncertainty confronting all affected groups is obvious. Because the *Miller* decision places the burden of regulation as well as enforcement on the States, many legislators already are or shortly will be assessing their obscenity laws for the purpose of amending them or enacting entirely new laws in light of the new *Miller* standard. Many will believe their existing statutes do not take advantage of the extent of regulation *Miller* appears to allow;[2] others will find their laws threatened or already

1. The pervading difference between the four judge majority and three judge minority in the decision below was a sharp disagreement on the proper interpretation of the decision of this Court in *Miller, supra.*

2. A new and more sweeping obscenity law was enacted in Oregon on July 25, 1973, barely a month after the decision in *Miller, supra* (S. 708, Chapter 699, 1973 New Laws 847); bills to enact more sweeping obscenity laws are pending in the State legislatures now in session, such as Pennsylvania (S. 737), and countless more may be expected in January, when most State legislatures reconvene.

stricken as unconstitutional under *Miller*.[3] Only clearer guidelines by this Court are likely to prevent the enactment of State legislation which is unconstitutional because of First Amendment or due process deficiencies.

As this Court noted in *Miller*, —— U.S., at ——, 93 S. Ct., at 2614, there are "inherent dangers of undertaking to regulate any form of expression." It insisted that "State statutes designed to regulate obscene materials must be carefully limited." We believe that only a clear statement by this Court on this appeal will serve to establish those careful limitations.

The chilling effect of the vague standards of *Miller* already has been felt throughout the nation. The erosion of First Amendment freedoms by the abuse which this Court's recent decisions have suffered at the hands of some law enforcement officials and citizens and the conflicting interpretations of some judges will be compounded by ostensibly lawful censorship resulting from new legislation if not "carefully limited".

Thus, it is essential that the Court now clarify its June 21 decisions and mark the limits of obscenity laws and proceedings, if there are to be such limits at all. Only by enunciating clearer guidelines for each of the three prongs of

3. New Jersey's law was declared unconstitutional in *Hamar Theatres, Inc.* v. *Cryan*, D. N.J., —— F.2d —— (3 judge ct., July 26, 1973); New York's law was also found unconstitutional in *Redlich* v. *Capri Cinema*, —— Misc. 2d —— (Sup. Ct. N.Y. Co. 1973); the Supreme Court of Indiana declared its obscenity law unconstitutional in *Mohney* v. *Indiana*, No. 471 S 94 and *Stroud* v. *Indiana*, No. 570 S 107, —— Ind. —— (August 21, 1973); and a judge in Louisiana dismissed an obscenity case after finding the Louisiana statute failed to meet the requirements of *Miller, supra*, in *Giarrusso* v. *Excalibor Books, Inc.* (Civ. Dist. Ct. for Orleans, July 13, 1973).

the *Miller* test and by clarifying the due process requirements for all obscenity proceedings will understanding instead of confusion prevail with the citizenry, the legislators, the law enforcement officials and the judiciary.

In view of the foregoing, the *Amici* seek leave to file the brief following hereafter.

Respectfully submitted,

WEIL, GOTSHAL & MANGES
Attorneys for Amici

By /s/ EDWARD C. WALLACE
EDWARD C. WALLACE

HEATHER GRANT FLORENCE
Of Counsel

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Interest of the *Amici*

This is set forth above in the motion to the Court.

ARGUMENT

POINT I

The decision below resulted from a misinterpretation of each of the three prongs of the *Miller* test.

Passing the violations of due process resulting from the lower court's treatment of Georgia statutes and its purported application of the *Miller* standards in a proceeding arising out of acts occurring before June 21, 1973,[4] *Amici* submit that, more importantly, the Georgia court misconstrued each and every one of the *Miller* tests.

As this Court stated in *Miller*, —— U.S., at ——, 93 S.Ct., at 2615:

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." (citations omitted)

In attempting to apply these tests, the court below proceeded on the assumptions: (1) that "contemporary community standards" could be *local* as distinguished from statewide; (2) that patently offensive sexual conduct could encompass mere nudity, four letter "obscenities" or activ-

4. Such retroactive application of the *Miller* ruling was found "the functional equivalent of an *ex post facto* application of the law (which) the due process clause forbids" by the court in *United States* v. *Lang*, C.D. Cal., No. 10712-HP-CD, —— F.Supp.—— (July 18, 1973).

ity far removed from the "hard core" variety; and (3) that the issue of the value of the material could be determined in accordance with a *local* as opposed to a *national* standard. We believe that all of these assumptions are an incorrect reading of *Miller* and its companion cases and we urge this Court to take this appeal and clarify its earlier rulings accordingly.

1. The scope of the "community" which is to decide prurience and patent offensiveness must be no smaller than the State.

Miller, in its first guideline, asked "whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest."

The Georgia Supreme Court interpreted *Miller* to mean that "local" community standards rather than a statewide community standard, may be applied in determining prurient appeal or patent offensiveness. "The *Miller* case, *supra,* further held that juries can consider State or local community standards in lieu of 'national standards' • • •" the court below said.

Amici believe that interpretation to be incorrect. In reaching this conclusion the Georgia court may have relied upon the following language in *Miller*:

> "It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City." (—— U.S., at ——, 93 S.Ct., at 2619).

The reference to municipal as well as State entities naturally has been the source of much confusion. Despite the confusion resulting from the above-quoted language, we believe that this Court intended to set down new guidelines in *Miller* in order that all affected parties understand the standards by which "obscenity" would be judged. "We are satisfied," this Court declared, "that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." (—— U.S., at ——, 93 S.Ct., at 2616-17).

That which at the time of the rulings appeared clearer than prior law to the majority of Justices in *Miller* has, however, engendered greater confusion among those affected by the decision. While *Amici* fear that replacement of a national standard by fifty State standards restricts First Amendment freedoms and poses severe practical hardships on disseminators of literary or artistic works, we believe that it was such a replacement which this Court adopted in *Miller*. We submit, however, that this Court must clarify that local counties, cities, towns and other local entities cannot set "community standards" and thereby create an incomprehensible patchwork of censorship which would affect the dissemination of protected works on the local and ultimately on the State and national levels because of the impracticalities of tailoring publication and distribution to an unlimited number of communities with varying standards.

We repeat the statement made in the brief submitted by several of the *Amici* in support of a petition for rehearing in *Kaplan*, that

> "The Amici presume that the Court did not intend to allow juries sitting in different counties within the

same State to judge the same or similar materials against varying standards. To allow such variation will amount to decisions being made in each case on the basis of the standards of the individuals on each jury. The consequence is, of course, no standard against which publishers, distributors and retailers can gauge materials even if they are familiar with the applicable State legislation."

If every county, city, town and village, not to mention neighborhood, in each of the fifty States is permitted to set its own local standards, even serious literary or artistic works will have difficulty finding publishers, distributors and retailers willing to risk a multiplicity of suits under potentially thousands of different local standards. We call the Court's attention to the practical problems that such standards create for the nation's publishers and distributors, who will incur economic hardship in operating on other than a national basis and who are simply unable, with respect to any particular work, to cater to and accommodate the endless variety of standards prevailing in the nation's countless local communities.[5] *Amici* do not believe that the Court's guidelines intend that the lowest common denominator control; yet, that is their effect.

We believe that the Court, in *Miller* v. *California*, intended that State standards control and we urge the Court that it grant the appeal to make that point clear.[6] In so

5. Members of some of the *Amici* have already encountered numerous instances of local censorship involving prohibitions against the sale and display of magazines such as "Cosmopolitan" that would be ludicrous were the implications less serious.

6. The *Miller* decision has also been construed to mandate State standards in Washington by the Supreme Court of Washington in *State* v. *J-R Distributors, Inc.*, 512 P. 2d 1049, 1065 (July 27, 1973).

doing, we urge that the Court make a definitive statement that the applicable community standards are no more local than those of the 50 States. Although the following statements in *Miller* have been misconstrued, we believe they do show that this Court intended that "local" standards be in fact *State* standards:

> "This Court has recognized that the *States* have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. (citations omitted) It is in this context that we are called on to define the standards which must be used to identify obscene material that a *State* may regulate without infringing the First Amendment as applicable to the States through the Fourteenth Amendment." (Emphasis supplied.) (—— U.S., at ——, 93 S.Ct., at 2612)
>
> • • •
>
> "We conclude that neither the State's alleged failure to offer evidence of 'national standards,' nor the trial court's charge that the jury consider *state community standards,* were constitutional errors." (Emphasis supplied) (—— U.S., at ——, 93 S.Ct., at 2619)
>
> • • •
>
> "People in different *States* vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity." (Emphasis supplied.) (—— U.S., at ——, 93 S.Ct., at 2620)

Similarly, statements in *Paris Adult Theatre I* v. *Slaton*, —— U.S. ——, 93 S.Ct. 2628 (1973), have the same import but have proven no more enlightening to those enforcing or interpreting the law. In *Slaton*, for example, this Court stated that:

"The *states* have the power to make a * * * judgment that public exhibition of obscene material, or commerce in such material, has a tendency to injure the *community as a whole* * * *." (Emphasis supplied.) (—— U.S., at ——, 93 S.Ct., at 2641)

It is clear to *Amici*, from these illustrations and numerous others in *Miller* and its companion cases, that the Court intended that the community standards used to determine prurient appeal and patent offensiveness be no more local than that of the States. We respectfully request the Court to now affirm that holding.

2. The type of sexual content which is unprotected must be limited to patently offensive representations or descriptions of "hard core" sexual conduct.

The second prong of the *Miller* guidelines asks "whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."

The Court explained that its aim was to bring under control "hard core" pornography. Thus, it clearly stated,

"Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive 'hard core' sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." (—— U.S., at ——, 93 S.Ct., at 2616-17)

Unfortunately, however, language in other parts of the decision have been used as a pretext to suppress works merely because they contain some sexual content—whether it be nudity or four letter words. Any sexual material appearing in "Carnal Knowledge" simply is not "hard core" sexual conduct. Moreover, as discussed in detail by appellant in the Jurisdictional Statement, there is a serious question whether Georgia's obscenity law does specifically define sexual conduct that may be proscribed if patently offensive and if the other tests of *Miller* are met.

Because the *Miller* decision requires that sexual conduct be "specifically defined by the regulating state law, as written or construed," many courts will be faced with the problem of construction with which the Georgia Supreme Court clearly wrestled.[7] The opinion below of the Georgia Supreme Court illuminates the dangers to due process resulting from the application of definitions from statutes dealing with such diverse subjects as "indecent exposure" and materials that may be deemed "harmful to minors". Definitions of sexual conduct in statutes dealing with indecent exposure or materials harmful to minors are manifestly inappropriate in defining "obscene materials" which "depict or describe patently 'hard core' sexual conduct," proscribed by the *Miller* decision as not falling within the ambit of protection afforded by the First Amendment. Incorporating such definitions either through judicial construction or in new legislation would clearly go beyond

7. This problem has already been encountered by judges considering the laws of New Jersey (*Hamar Theatres Inc.* v. *Cryan, supra*); New York (*Redlich* v. *Capri Cinema, supra*); Washington (*State* v. *J-R Distributors, Inc., supra*); District of Columbia (*United States* v. *Dorfman*, D. D.C., Crim. No. 181-73, —— F.Supp. ——, August 31, 1973) and California (*People* v. *Enskat*, 2nd Crim. No. 22506, —— P.2d —— (Ct. of App. Cal. 2d Dist. August 8, 1973) to name a few.

the intention and, we believe, the holding of the Court that only "hard core" sexual conduct which is patently offensive may be banned.[8]

In view of this Court's statement in *Miller* that its goal is to isolate and control hard core pornography, the *Amici* do not believe that the Court meant to abandon a basic premise of *Roth* v. *United States*, 354 U.S. 476 (1957) that "sex and obscenity are not synonymous."

In *Roth*, the Court specifically noted that:

> "Sex, a great and mysterious motive force in life has indisputably been a subject of absorbing interest to mankind throughout the ages; it is one of the vital problems of human interest and public concern." (354 U.S. at 487)

Indeed, the Court in *Miller* observed that "One can concede that the 'sexual revolution' of recent years may have had useful byproducts in striking layers of prudery from a subject long irrationally kept from needed ventilation." (—— U.S., at ——, 93 S.Ct., at 2621).

Although four Justices of this Court as well as *Amici* and others disagree, it is apparent that a majority of the Court believe it necessary and possible to draw the fine line dividing protected material from unprotected material. While the majority of this Court has stated that the line should cut off protection from "hard core" sexual conduct, the short experience with *Miller* since June 21, 1973 and,

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8. Indeed, application of the definitions in many of the States' laws dealing with material "harmful to minors" would violate the clear holding of this Court in *Butler* v. *Michigan*, 352 U.S. 380 (1957), that the reading material for adults should not be curtailed to what is fit for children.

indeed, the decision below itself shows that much wider interpretations have and are likely to prevail.[9]

This confusion seems to result from language in *Miller* itself. While the Court in *Miller* states that regulation must be confined to works which depict or describe "hard core sexual conduct", it gives examples that are potentially more encompassing;[10] it goes on to suggest that mere nudity may be proscribed:

> "Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation." (—— U.S., at ——, 93 S.Ct., at 2615-16)

It remains less than clear that a State cannot regulate materials which contain descriptions or representations of nudity—the human body in its natural state. And, indeed, the Georgia Supreme Court believed that it was constitutionally permissible to ban a film and convict an exhibitor because of some nudity, some four letter words and a sexual theme which, we submit, cannot be construed as present for the commercial exploitation of prurient appeal.

Amici respectfully urge the Court to clarify that regulation must be limited to hard core sexual conduct and not mere sexual content, language or depictions of the nude human body.

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9. The frequent *per curiam* reversals by this Court of state court decisions based on *Redrup* v. *New York*, 386 U.S. 767 (1967), illustrate that any ambiguity in this Court's decisions contain the seeds of abuse.

10. In fact, one judge found that *Miller* and its companion cases set forth different evidentiary requirements for materials which are "hard core pornography" than for materials which are "obscene" but not hard core pornography. See memorandum decision in *Maryland State Board of Motion Picture Censors* v. *Gallagher*, Circuit Court of Baltimore City, *per* Thomas, J. (July 11, 1973).

3. The standard for deciding whether a work has serious value must be a national standard.

In rejecting the "utterly without redeeming social value" test as a constitutional requirement in *Miller*, this Court has set forth as the third test "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." Although this test is presumably to be made in accordance with a national standard, nowhere in *Miller* is that governing standard specifically stated. Because of the emphasis in *Miller* on community standards with respect to prurient appeal and patent offensiveness, the court below incorrectly assumed that a community standard governed this determination as well.

To avoid continuing misconstruction, *Amici* submit that this Court should now clarify that the third prong of the *Miller* test requires—unlike the other two tests—the application of a national standard. Clearly, we submit, this was the Court's intention.

In *Miller* the Court said:

> "The First Amendment protects works which, taken as a whole, have serious literary, artistic, political or scientific value, regardless of whether the government or a majority of the people approve of the ideas these works represent. 'The protection given speech and press was fashioned to assure unfettered interchange of *ideas* for the bringing about of political and social changes desired by the people." (—— U.S., at ——, 93 S.Ct., at 2620-21).

The First Amendment protection of works which taken as a whole have serious value, "regardless of whether the

government or majority of the people approve of the ideas these works represent," cannot be taken away by a community which applies its own standards of literary or artistic value. The literary or artistic merit of a movie or book and the existence of ideas therein presented are not subjects for determination by "community standards." Moreover, a movie or book which has serious literary or artistic value is, under the guidelines of *Miller*, still entitled to First Amendment protection, even where—unlike the case at bar—it appeals to the prurient interest and is patently offensive.

Nevertheless, as obvious as these matters may appear to *Amici* and to this Court, misinterpretations made by others, including the court below, indicate the need for clarification of the "serious value" standard.

Indeed, besides making clear that "serious value" is to be determined by a national standard, detached from the issues of prurient appeal and patent offensiveness, *Amici* submit that the Court should grant this appeal to reaffirm its earlier holding that entertainment and "value" are not mutually exclusive. As this Court has recognized, the fact that a movie or a book may also be designed to entertain makes it no less subject to such protection. As Justice Clark observed in *Burstyn* v. *Wilson*, 343 U.S. 495, 501 (1952), the entertainment and commercial values of motion pictures make them no less

> "a significant medium for the communication of ideas. They may affect public attitude and behavior in a variety of ways, ranging from direct espousal of a political or social doctrine to the subtle shaping of thought which characterizes all artistic expression.

> The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform * * *."

Simply because the third prong of *Miller* sets forth four specific types of value, *Amici* do not believe this Court meant to deny protection to works with value in other areas such as philosophy, education and entertainment.

Finally, with respect to the third prong of the *Miller* test, this Court should clarify that it is not the role of, nor is it even possible for, the average juror, or a judge without a jury, to determine value on a national standard based solely on his or her assessment of the materials. That determination must be based not on personal subjective considerations, but on the opinions of critics, scholars and other literary experts. *Amici* submits that the Court below erred in failing to consider the national critical acclaim given to "Carnal Knowledge" the film here in issue.

Absent such clarification, decisions such as the one at bar will recur. The critical acclaim to which "Carnal Knowledge" has been received as briefly indicated in the dissenting opinion of Justice Gunter below, and the list of its credits—produced and directed by Mike Nichols, adapted for the screen play by Jules Feiffer and staring Jack Nicholson, Ann-Margret and other actors of similar high quality and renown—in and of themselves indicate the lower court's error in holding that the film lacks serious value.

But, as the minority opinion of Justice Gunter indicates, the four members of the majority below substituted their

personal evaluation of the film's literary and artistic value. "[M]aterial is pornographic and unprotected in the subjective mind and senses of one judge;" Gunter, J., said, "and the same material has serious literary or artistic value in the subjective mind and senses of another judge."

In view of the widespread misunderstanding of the "serious value" test it is respectfully submitted that the Court should make clear that a national standard, unlinked to the issues of prurient appeal and patent offensiveness and based on the evaluations of critics, scholars and other literary experts, is the only proper standard to apply; that "serious value" is a judgment of quality, not popularity, and as such is not subject to determination by majority vote based on personal taste.

POINT II

Confusion resulting from *Miller* and earlier efforts to define the perameters of constitutional protection instruct that due process requirements be clarified.

1. The problem of defining obscenity with sufficient clarity has not been solved.

In light of the inherent and now apparent confusion resulting from the vague guidelines of *Miller* and related cases as set forth above, *Amici* believe that the need for clarification is urgent. Nevertheless, the tortured history of this Court's obscenity decisions, as recognized by all of the Justices, convinces us that no effort at clarification or specificity can reconcile suppression of sexually related material with the fundamental principles of the First Amendment.

The *Amici*, therefore persuaded that only the approach adopted by the minority of the Court in *Slaton, supra*, will satisfy First Amendment commands, urge this Court to reevaluate the threshold issue—the possibility of "reconciling state efforts to suppress sexually oriented expression with the protections of the First Amendment, as applied to the States through the Fourteenth Amendment." *Paris Adult Theatre I* v. *Slaton, supra*, —— U.S., at ——, 93 S.Ct., at 2642 (Brennan, J., joined by Stewart, J., and Marshall, J., dissenting). Accordingly, *Amici* respectfully suggest, for the reasons set forth in Mr. Justice Brennan's *Slaton* opinion and in *Amici's* brief in support of a petition for rehearing in *Kaplan*, that the limits of obscenity regulation be permitted to extend no further than well-defined efforts to avoid exposure to minors and intrusion of the privacy and sensibility of adults offended by pandering and commercial promotion.

The "Carnal Knowledge" prosecution and similar experiences, both before and after *Miller*, involving works of serious literary and artistic value support the minority in sounding the "alarm of repression" and being unconvinced by the Court's statement in *Miller* that

> "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." (—— U.S., at ——, 93 S.Ct., at 2615).

The inadequacy of independent appellate review in safeguarding First Amendment values was noted by Justice Gunter in his dissenting opinion below, stating:

> "My experience with this one case teaches me that the 'alarm of repression' was validly sounded; it also

> teaches me that the *Miller* majority's assumption, that courts can distinguish commerce in ideas that is protected from commercial exploitation of obscene material that is not protected, is a too optimistic assumption. The instant case is the proof that is in the pudding; material is pornographic and unprotected in the subjective mind and senses of one judge; and that same material has serious literary or artistic value in the subjective mind and senses of another judge * * *."

Because of the inability to define and isolate obscene materials, protected materials will continue to be threatened and banned and this Court will simply resume the role it fulfilled under *Redrup, supra*—a role it has sought to avoid.

Amici, therefore, urge the Court to adopt Mr. Justice Brennan's position in *Slaton*, that

> "in the absence of distribution to juveniles or obtrusive exposure to unconsenting adults, the First and Fourteenth Amendments prohibit the state and federal governments from attempting wholly to suppress sexually oriented materials on the basis of their allegedly 'obscene' contents." (—— U.S., at ——, 93 S.Ct., at 2662).

2. A prior civil determination of obscenity should be constitutionally mandatory as the only means to provide fair notice.

If this Court is not prepared to adopt the position set forth above, a position which, we submit, does balance the interests of the States with constitutional requirements, it should at least provide those who create, publish, produce and disseminate material subject to legal guidelines which always are subject to varying interpretation, with protection from the hazards and risks of criminal prosecutions.

This Court has expressed its preference for a procedure under which a civil proceeding determining obscenity precedes any criminal prosecution. Mr. Chief Justice Burger observed in *Slaton* that

> "such a procedure provides an exhibitor or purveyor of materials the best possible notice, prior to any criminal indictments, as to whether the materials are unprotected by the First Amendment and subject to state regulation." (—— U.S., at ——, 93 S.Ct., at 2634).

He added that such

> "procedure would have even more merit if the exhibitor or purveyor could also test the issue of obscenity in a similar civil action, prior to any exposure to criminal penalty." (—— U.S., at ——, 93 S.Ct., at 2634 n.4).

In view of the arguments set forth above, *Amici* respectfully submit that this Court should hold such procedure not only preferable to direct institution of criminal prosecutions, but constitutionally required.

The arrest, prosecution, and conviction of Billy Jenkins for exhibiting "Carnal Knowledge" a film, not only accepted but acclaimed throughout the nation, should be a lesson in the impossibility of predicting what will be found "obscene" and in the failure of even "specific prerequisites" to "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution." (—— U.S., at ——, 93 S.Ct., at 2616-17).[11]

11. *Amici* believe that the "cruel and unusual punishment" reasoning adopted by the Court in *Furman* v. *Georgia*, 408 U.S. 238 (1972), is equally applicable where a distributor or exhibitor is subject to the uncertain and arbitrary risk of criminal prosecution prior to any civil proceeding determining obscenity.

The Commission on Obscenity and Pornography, advocating a prior civil determination of obscenity, has argued:

> "the criminal process should not ordinarily be invoked against persons who might have reasonably believed, in good faith, that the books or films they distributed were entitled to constitutional protection, for any threat of criminal sanctions might otherwise deter the free distribution of constitutionally protected material." Report of the Commission on Obscenity and Pornography 71 (1970).

Using somewhat stronger language, Mr. Justice Douglas reached the same conclusion in *Miller*. He stated:

> "If a specific book, play, paper or motion picture has in a civil proceeding been condemned as obscene and review of that finding has been completed, and thereafter a person publishes, shows or displays that particular book or film, then a vague law has been made specific. There would remain the underlying question whether the First Amendment allows an implied exception in the case of obscenity. I do not think it does and my views on the issue have been stated over and again. But at least a criminal prosecution brought at the juncture would not violate the time-honored void-for-vagueness test."
>
> "* * * To send men to jail for violating standards they cannot understand, construe, and apply is a monstrous thing to do in a Nation dedicated to fair trials and due process." (—— U.S., at ——, 93 S.Ct., at 2624-25).

Amici believe that the requirement of a prior civil determination of obscenity will permit states to exercise effective control of unprotected material without needlessly and unjustly victimizing booksellers and motion picture

exhibitors with the threat or actual imposition of criminal penalty and its heavy financial burdens and unfair toll on reputation. We believe that such a requirement is necessary to protect against the chilling effects of grass-roots censorship and of self-censorship on controversial but constitutionally protected material.

A bald criminal statute, even if aimed only at the panderer of hard-core pornography, in the hands of a prosecutor, either on his own initiative or under pressure from vocal minorities, could subject the local librarian, the man who runs the neighborhood movie theatre, the corner bookstore clerk or even the druggist who carries paperbacks in his store to the same criminal sanctions and personal humiliations as the pornographer. The perpetual threat of prosecution imposes an intolerable burden on their right and responsibility to make a broad selection of constitutionally protected materials available to the people of this Nation.

Conclusion

In view of the foregoing, *Amici* respectfully request that this Court grant the appeal, reverse the conviction and set forth clear substantive and procedural requirements to prevent further infringements of constitutional rights.

Respectfully submitted,

Edward C. Wallace and
Weil, Gotshal & Manges
Attorneys for Amici
767 Fifth Avenue
New York, New York 10022

Heather Grant Florence
Of Counsel